IN THE

Supreme Court of the United States

October Term, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISION OF HUMAN RIGHTS on the Complaints of DONNA J. STERLING, MARY J. SLEDGE, SHIRLEY J. FELKER, PAMELA N. DOLAN, MARJORIE ADAMS, BONNIE L. WEAD, JOSEPHINE KANDEFER and DELORES KOSTELNY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD DEPARTMENT

FREDERICK T. SHEA
350 Park Avenue
New York, New York 10022

WALTER P. DEFOREST
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

STUART I. SALTMAN
Gateway Center
Pittsburgh, Pennsylvania 15222

Attorneys for Westinghouse Electric Corporation

KELLEY DRYE & WARREN
REED SMITH SHAW & MCCLAY
Of Counsel

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Petitioner, Westinghouse Electric Corporation ("Westinghouse"), respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of New York, Third Department.

Opinions Below

The opinion of the Appellate Division of the Supreme Court of New York, Third Department, is officially reported at 60 AD2d 943 and is set forth in App. A, *infra*, pp. A1-A4. The decisions of the State Human Rights Appeal Board, and the decisions and orders of the Commissioner of the State Division of Human Rights made in this case are unreported and are set forth in App. B and C, respectively, *infra*, pp. A5-A6, A7-A41.

Jurisdiction

The final order of the Appellate Division of the Supreme Court of New York, Third Department (App. D, *infra*, pp. A42-A43) was made and entered on February 22, 1978. By its decision made on July 11, 1978, the New York Court of Appeals denied without opinion petitioner's timely application for leave to appeal such judgment (App. E, *infra*, p. A44).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

In *General Electric Company* v. *Gilbert*,[1] this Court determined that the exclusion of pregnancy-related disabilities from an employer's disability benefits plan did not violate the federal Civil Rights Act of 1964 because it did not constitute discrimination on the basis of sex. Two weeks later the New York Court of Appeals in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*,[2] decided

1. 429 U.S. 125 (1976).
2. 41 NY2d 84 (1976).

that such an exclusion did constitute sex discrimination and therefore violated the New York State Human Rights Law. On the authority of that latter decision the Appellate Division of the Supreme Court of New York, Third Department, held that Westinghouse's multi-state disability benefits plan violated the New York civil rights statute because it excluded pregnancy-related disabilities. The New York Court of Appeals denied petitioner's application for leave to appeal. The questions presented are:

Whether the New York State Human Rights Law, insofar as it has been construed by that state's highest court in 1976 to prohibit as sex discrimination the failure of an employer in interstate commerce to include coverage of pregnancy-related disabilities in its negotiated employee disability benefits plan, is invalid under Article VI, §2 of the Constitution of the United States, in that it

(a) is pre-empted by the Federal Employee Retirement Income Security Act of 1974 (ERISA), and, in any event,

(b) was inconsistent with the provisions of the federal Civil Rights Act of 1964, as construed by this Court, and therefore pre-empted by Section 1104 of that Act.

Statutes and Constitutional Provisions Involved

United States Constitution, Article VI, §2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The provisions of Sections 4 and 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1003 and 1144 are set forth at App. F, *infra,* pp. A45-A47.

Section 1104 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000h-4:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

The relevant portion of Section 296 of the New York Human Rights Law, Article 15, Executive Law, is set forth below:

"**§296. Unlawful discriminatory practices**

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency because of the age, race, creed, color, national origin, sex or disability or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Statement of the Case

This consolidated case grows out of the filing of complaints with the New York State Division of Human Rights by eight female employees of Westinghouse in 1972, 1973 and 1974. All the complaints alleged that Westinghouse had discriminated against the employees on the basis of their sex in violation of the New York State Human Rights Law by failing to provide them with disability benefits for the time they were disabled by pregnancy although disability benefits are paid by Westinghouse in the case of other non-occupational disabilities.

Four separate hearings, each involving one or more of the complainants, were held by the State Division of Human Rights and in each case, the Commissioner of the Division of Human Rights found that Westinghouse, by its exclusion of pregnancy from its national non-occupational sickness and accident plan, had discriminated against complainants on the basis of their sex in violation of the New York Human Rights Law.[3] The Commissioner in each case ordered, *inter alia,* that Westinghouse cease discriminating against its female employees by refusing to pay disability benefits for absences from work caused by pregnancy-related disabilities (App. C, *infra,* pp. A7-A41).

In each case a timely appeal from the Commissioner's Decision and Order was filed with and heard by the New York State Human Rights Appeal Board prior to November, 1976. During 1977 the Appeal Board in each case affirmed the orders of the Commissioner, without opinion in

3. In one of the cases the Commissioner found there was no evidence of discrimination against one of the four employees in that case.

two of the cases and with an opinion in the other two (App. B, *infra*, pp. A5-A6).

In each of the four cases, and pursuant to the provisions of the New York Human Rights Law, Westinghouse by a petition instituted a special proceeding in the Appellate Division of the Supreme Court of New York, Third Department, to review and set aside the decisions and orders of the Appeal Board and of the Commissioner on the ground, among others, that the decisions and orders are not in conformity with the constitution and laws of the United States.

In each petition Westinghouse alleged, and Respondents in their answers admitted, that, complainants are covered by a multi-state employee benefit plan that Westinghouse maintains at 41 of its plants throughout the United States, as a result of collective bargaining negotiations with the International Union of Electrical, Radio and Machine Workers (A.F.C.-C.I.O.-C.L.C.) and that it provides insurance payments to employees for time lost from work because of total disability resulting from certain non-occupational sicknesses and accidents.

The court below thereafter consolidated the four review proceedings for the purpose of a hearing. At such hearing and in briefs submitted to the court in connection with such hearing both parties argued the questions raised in the petitions whether the New York Human Rights Law, as interpreted by the New York Court of Appeals and applied against Westinghouse in these consolidated cases, violates the Supremacy Clause of the Constitution because it is preempted by the provisions of ERISA and by the provisions of the federal Civil Rights Act of 1964. The Appellate Division of the Supreme Court of New York, Third Department, rendered an opinion (App. A, *infra*, pp. A1-A4) expressly rejecting Westinghouse's claim of federal preemption and entered its order (App. D, *infra*, pp. A42-A43) confirming the orders of the State Human Rights Appeal Board and dismissing Westinghouse's petitions. Thereafter Westinghouse filed a timely notice of appeal as of right to the New York Court of Appeals and on April 4, 1978 the New York Court of Appeals granted an order dismissing the appeal on the ground that since "no substantial constitutional question is directly involved," the New York Civil Practice Law and Rules did not authorize an appeal as of right in the circumstances. Thereupon Westinghouse filed with the New York Court of Appeals a timely petition for leave to appeal which by its order dated and entered July 11, 1978 (App. E, *infra*, p. A44) the New York Court of Appeals denied without opinion.

Reasons for Granting the Writ

The decision of the state court below should be reviewed because it has decided two important federal questions of substance not previously determined by this Court and has decided each of the two questions in a way that is in direct conflict with the decisions of courts in other states. The first such question involves the interpretation of the preemption provisions of ERISA and a determination whether those provisions prohibit a state from regulating employee benefit plans by applying to them state employment discrimination laws that differ from the comparable federal laws.

The importance of this federal question is emphasized by the time and attention the Congress devoted to the subject of preemption in fashioning its comprehensive regulation of employee benefit plans in ERISA. Such importance is heightened by the fact that at least 42 states have comprehensive employment discrimination laws that potentially could be applied to multi-state employee benefit plans in ways that differ from federal regulations as well as from each other. Thus, the insurance, welfare and pension plans of employers with multi-state operations are in danger of being subjected to conflicting regulations on the state level *vis-á-vis* the federal level and conflicting regulation from one state to the other.

When Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, it made it abundantly clear that it intended to regulate all employee benefit plans, whether of the pension or welfare variety. To this end Congress defined the term "employee benefit plan" as,

> "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan", 29 U.S.C. §1002(3),

and defined an employee welfare benefit plan to include,

> "any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . ." 29 U.S.C. §1002(1)(A).

Congress also left no doubt that it intended to supersede and exclude any regulation of such plans by any individual state law, except in certain narrow circumstances that the statute specifically describes. Thus, Section 514 of the Act, 29 U.S.C. §1144(a), expressly provides:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

Subsection (b) of Section 514 specifically excepts only state insurance, banking and security laws and general criminal statutes from ERISA's preemption. 29 U.S.C. §1144(b). Obviously by excepting insurance, banking, securities and general criminal statutes, Congress made a judgment that those state statutes specifically mentioned were the only state laws to be saved from preemption.

The scope of the preemption Congress intended to accomplish regarding employee benefit plans, and the importance it attached to that accomplishment, are made clear in the Congressional reports and debates that form the legislative history of the Act.

The Conference Committee Report to the House and Senate concerning the preemption provisions that became Section 514 of the Act explained the proposed legislation in part as follows:

> "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an

employee organization that represents employees engaged in or affecting interstate commerce. (However, following title I generally, preemption will not apply to government plans, church plans not electing under the vesting, etc., provisions, workmen's compensation plans, non-U.S. plans primarily for nonresident aliens, and so-called 'excess benefit plans.').

* * *

"The preemption provisions of title I are not to exempt any person from any State law that regulates insurance, banking or securities. However, the substitute generally provides that an employee benefit plan is not to be considered as an insurance company, bank, trust company, or investment company (and is not to be considered as engaged in the business of insurance or banking) for purposes of any State law that regulates insurance companies, insurance contracts, banks, trust companies, or investment companies. This rule does not apply to a plan which is established primarily to provide death benefits; such plans, of course, may be regulated under the State insurance, etc., laws. H.R. No. 93-1280, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 5038, 5162."

Speaking in support of the bill that emanated from the Senate-House Conference Committee and became the Act, Congressman Dent stated:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of *the sole power to regulate the field of employee benefit plans. With the preemption of the field,* we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.
>
> * * *

> "The conferees, with the narrow exceptions specifically enumerated, applied this principle *in its broadest sense* to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach *any* rule, regulation, practice or decision of any State, . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b)." 120 Cong. Rec. 29197 (1974) (emphasis supplied).

Senator Williams, Chairman of the Senate Labor and Public Welfare Committee and Co-Sponsor of ERISA, made a similar statement to the Senate:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply *in its broadest sense* to all actions of State or local government, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933 (1974) (emphasis supplied).

Senator Javits, a leading sponsor of ERISA, made the following statement in explaining the preemption provision and why total preemption, rather than limited preemption, was adopted by the Conference Committee:

> "Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulations, as well as

opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans *required*—but for certain exceptions—the *displacement of State action in the field of private employee benefit programs.*" 120 Cong. Rec. 29942 (1974) (emphasis added).

Although the above language leaves no reason to doubt that Congress intended to preempt all state laws affecting employee benefit plans that it did not expressly except, a colloquy between Senators Williams and Javits, co-sponsors of ERISA, in the recent legislative debates over the Age Discrimination In Employment Act of 1978, confirms that ERISA preempts all state fair employment laws to the extent that they relate to employee benefit plans.

"Mr. Javits. Finally, Mr. President, it is understood that just as these age discrimination amendments [to the ADEA] do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discrimination laws. However, there should be no question that *the preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly established requirements relating to employee benefit plans. ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA [29 U.S.C. §1144(d)] or the fact that the ADEA does not itself preempt State law.*

"Mr. Williams. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law *will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan* described in section 4(a) of ERISA and are not exempt under section 4(b) of ERISA. [ERISA section 4(a) provides that ERISA applies to plans of employers engaged in interstate commerce while ERISA section 4(b) provides that ERISA does not apply to governmental plans, church plans, etc.]" (emphasis added). 124 Cong. Rec. S4451 (1978), typographical error corrected 124 Cong. Rec. S4767 (1978).

Viewed against the background of this legislative history any question concerning the applicability of a particular state law to the employee benefit plans of employers in interstate commerce becomes a substantial federal question. This is particularly so when, as here, the question involves the applicability to employee benefit plans covered by ERISA of state employment practices acts, because of the great proliferation and variety of such state acts and the manner in which many of them differ from the provisions of the federal anti-discrimination laws and from each other.

An analysis of state employment practices laws reveals that many go beyond the federal proscriptions of discrimination in employment on the basis of race, religion, color, sex and age. As Appendix G, *infra* (pp. A48-A49) shows, there are at least 35 states that prohibit discrimination by private employers on the basis of handicap. Further, in

dealing with age as a basis for discrimination, at least 20 states include in the protected group individuals whose ages do not qualify them for protection under the Federal Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Absent preemption, each of these state statutory provisions has the potential of making illegal in a particular state a pension or welfare plan covered by, and in full compliance with, federal law. This potential for confusion between state and federal regulations is not limited to the area of disability benefit plans.

For example, Section 1052(a)(2)(b) of ERISA provides that an employer may exclude employees from participation in a pension plan if the employees begin employment "after they have attained a specified age which is not more than five years before the normal retirement age under the plan." Since many states have no floor or ceiling in their age discrimination laws, the exclusion set forth in ERISA could be construed to be violative of state law, thereby creating a conflict between federal and state regulations in this area.

Additionally, in *City of Los Angeles, Department of Water and Power* v. *Manhart,* 98 S. Ct. 1370 (1978) this Court recognized that there are actuarial differences based on sex, race or national origin. If ERISA does not preempt state employment practices acts, any multi-state employer could be faced with conflicting state regulations regarding the actuarial assumptions used in its employee benefit plans. Clearly, the legislative history of ERISA and the statements of Senators Williams and Javits reflect a congressional intent to preempt fair employment laws as they affect employee benefit plans.

Even with respect to those provisions of state employment practices laws that do not differ from the corresponding provisions of Title VII there is a great potential for state rulings that conflict with federal laws on the same subject. For example, the many thousands of employers in interstate commerce, who by reason of this Court's determination in *City of Los Angeles, Department of Water and Power* v. *Manhart, supra,* must require male employees to contribute to their pension plans in the same amounts as female employees, must now anticipate (absent preemption) the possibility that a pension plan so structured in compliance with Title VII may be found by one or more state courts to violate their local anti-discrimination law on the basis of a disparate impact theory that this Court rejected in the *Manhart* case. When one considers that in 1974 almost one-half of the private non-farm work force were covered by employee benefit plans of the pension variety[4] it is clear that the application of state employment practices laws to employee benefit plans covered by ERISA presents a substantial and important question for this Court to determine.

Further, the current state of judicial precedent in regard to the scope of ERISA preemption is greatly in need of clarification by this Court. First, there are numerous decisions on the state level and a few federal decisions which have ignored the broad and unambiguous statutory language of the ERISA preemption provision discussed *supra* at p. 9. Those decisions incorrectly, we submit, have held that the scope of ERISA's preemption is limited to the areas of funding, reporting and plan administration. The

4. H.R. (Education and Labor Committee) No. 93-533, 93rd Cong., 2nd Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 4639, 4641.

approach of this group of decisions has been that, notwithstanding ERISA's explicit, broad preemption provision, only those state statutory provisions which actually conflict with particular substantive provisions of ERISA would be considered preempted.[5] There is a second group of cases which have adopted another interpretation of the ERISA preemption provisions that, we submit, is also incorrect.[6] These cases have first noted that ERISA's preemption provision contains a statement that it does not supersede other federal statutes[7] and then noted that Title VII of the Civil Rights Act of 1964 provides that it does not preempt state fair employment practices statutes;[8] on the basis of those two factors, this second group of cases has held that Congress excepted state fair employment statutes from preemption by ERISA. Of course, other decisions on both the federal and state level, frequently relying upon the legislative history discussed *supra* at pp. 9-13, have rejected the argument that ERISA preemption is limited to the subjects of funding, reporting, and plan administration,[9] as

5. *E.g., Time Ins. Co.* v. *Department of Industry, Labor and Human Relations,* 16 FEP Cases 391 (Cir. Ct., Dane County, Wis., 1978); *Minnesota Mining and Manufacturing Co.* v. *State of Minnesota,* Nos. 422929, 423034 (Dist. Ct., Ramsey County, Minn., 1978).

6. *E.g., Bucyrus-Erie Co.* v. *Dept. of Industry, Labor and Human Relations,* 17 FEP Cases 1230 (E.D. Wis. 1978); *Goodyear Tire & Rubber Co.* v. *Dept. of Industry, Labor and Human Relations,* 16 E.P.D. ¶8163 (Cir. Ct., Dane County, Wis., 1978).

7. Section 514(d) of ERISA, which is found at 29 U.S.C. §1144(d).

8. 42 U.S.C. 2000e-7, 2000h-4.

9. *E.g., Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 46 U.S.L.W. 3650 (April 17, 1978); *Hewlett Packard Co.* v. *Barnes,* 425 F.Supp. 1294 (N.D. Cal. 1977), *aff'd,* 571 F.2d 502 (9th Cir. 1978); *Azzaro* v. *Harnett,* 414 F.Supp. 473 (S.D. N.Y. 1976), *aff'd,* 558 F.2d 93 (2d Cir. 1977); *Standard Oil Co.* v.

(footnote continued on next page)

well as the argument that Section 514(d) of ERISA somehow excepts state fair emplolyment practices statutes from the preemption provided in Section 514.[10] However, it is obvious that there is considerable conflict among the decisions on these two important points regarding the scope of the ERISA preemption provision and that the state of the law in this area would benefit greatly by clarification by the Court.

A recent amendment to Title VII essentially provides that in the future pregnancy is to be treated by benefit plans, sick leave plans, etc. in a manner similar to other situations of inability to work.[11] The enactment of this amendment reinforces Westinghouse's argument that regulation of employee benefit plans is a matter appropriately within the sphere of federal regulation. There is not only no need for regulation of such plans under state fair employment statutes, but the case law which rejects the concept of ERISA preemption actually subjects the plans of multi-state employers to different rules and different re-

Agsalud, 442 F.Supp. 695 (N.D. Cal. 1977); *Bell* v. *Employee Securityl Benefit Ass'n,* 437 F.Supp. 382 (D. Kan. 1977); *In re C. D. Moyer Co. Pension Trust,* 441 F.Supp. 1128 (E.D. Pa. 1977); *National Carriers Conference Committee* v. *Hefferman,* 203 BNA Pension Reporter D-6 (D. Conn. Aug. 4, 1978).

10. *E.g., Mountain States Telephone and Telegraph Co.* v. *Commissioner of Labor and Industry,* No. 41908 (Dist. Ct., Lewis & Clark County, Mont. 1978).

11. Pub.L. No. 95-555 (signed by the President on Oct. 31, 1978). That statute further provides that employers, such as Westinghouse, with existing benefit plans will not be required to include pregnancy until six months from the effective date of the amendment. The state fair employment practices statutes, on the other hand, would impose such coverage retroactively, leading to massive back pay awards. Massive back pay awards could bankrupt such benefit plans, contrary to what this Court has indicated should be the federal approach to regulation of benefit plans. *City of Los Angeles* v. *Manhart,* 98 S.Ct. 1370, 1382 (1978).

quirements from one state to another, depending upon the particular interpretation given to a race, sex, age, national origin, etc. statutory prohibition in that state. Thus, this Court should accept the present case for review and clarify the scope of ERISA preemption. The state and federal precedent which has adopted a narrow reading of the ERISA preemption provisions should be corrected. Otherwise, applications of state fair employment practice statutes, as well as a multitude of other state statutes, will negate both the language and the intent of ERISA's broad preemption provisions.

The importance of the second federal question, involving the interpretation and application of Section 1104 of the federal Civil Rights Act of 1964 in the circumstances of this case, depends of course on the final answer to the first federal question that this case presents. If this Court should construe ERISA as permitting the application of New York's anti-discrimination law to the muilti-state disability benefits plans of Westinghouse there would arise the substantial and important question whether the New York anti-discrimination law, in outlawing as sex discrimination the exclusion of pregnancy disability benefits from an employee disability benefits plan, was inconsistent with (and therefore preempted by) the federal Civil Rights Act of 1964 which declares such exclusion not to be sex discrimination at all.

This Court has twice dealt with the exclusion of pregnancy disabilities from coverage under employee disability benefit plans, and both times it expressly held that such an exclusion does not constitute sex discrimination at all. *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *General Electric Company* v. *Gilbert,* 429 U.S. 125 (1976). Notwithstanding the federal law on the subject, in at least 19 states the

employment discrimination laws either expressly or by interpretation characterize such exclusion of pregancy disabilities as sex discrimination and proscribe the exclusion on that basis. In the case of New York the Court of Appeals in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board,* 41 NY2d 84 (1976) considered and expressly refused to follow this Court's ruling in *General Electric Company* v. *Gilbert, supra,* even though it admitted that the pertinent parts of Title VII that this Court construed "are substantially identical" to those of the New York Human Rights Law then before that court. Since most of the 50 states have laws that prohibit "sex discrimination", the question whether each of them is free to apply the term to employers in interstate commerce in a manner that conflicts with federal law on the subject is of great importance to every multi-state employer in the nation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK T. SHEA
350 Park Avenue
New York, New York 10022

WALTER P. DEFOREST
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

STUART I. SALTMAN
Gateway Center
Pittsburgh, Pennsylvania 15222

Attorneys for Westinghouse Electric Corporation

KELLEY DRYE & WARREN
REED SMITH SHAW & MCCLAY
Of Counsel

Appendices

APPENDIX A

Opinion of the Appellate Division of the Supreme Court of New York, Third Department, Dated January 19, 1978

SUPREME COURT
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

January 19, 1978

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WESTINGHOUSE ELECTRIC CORPORATION,
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In the Matter of
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STATE HUMAN RIGHTS APPEAL BOARD *et al.*,
Respondents.

Proceedings initiated in this court pursuant to section 298 of the Executive Law to review orders of the State Human Rights Appeal Board, dated May 12, 1977 and July 18, 1977, which affirmed orders of the State Division

of Human Rights finding that petitioner had discriminated against each of the complainants because of her sex by disallowing disability benefits during a period she was disabled by pregnancy and childbirth.

The petitioner raises no question as to the sufficiency of the evidence to establish the necessary facts of discrimination. Further, it concedes that pursuant to the recent case of *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board* (41 N Y 2d 84, rearg. den. 42 N Y 2d 824) it is established that the discrimination herein is a violation of the Human Rights Law (Executive Law, art. 15).

The petitioner nevertheless urges this court to find that the mandate of the Human Rights Law (referred to by it as "HRL") as settled in the *Brooklyn* case is unenforceable as a matter of law in the following "Points" of its brief:

> Point Two—To the extent that the HRL's prohibition against discrimination on the basis of sex is interpreted to prohibit an employer's failure to provide in its employee disability benefits plan coverage of disabilities due to pregnancy, the HRL conflicts with the provisions of Title VII of the Federal Civil Rights Act of 1964 and is preempted by section 1104 of that Federal statute * * *
>
> Point Three—To the extent that the HRL's prohibition against discrimination on the basis of sex is interpreted to compel an employer to provide in its employee benefits plan coverage of disabilities due to pregnancy, the HRL is preempted by ERISA * * * [The Employment Retirement Income Security Act of 1974—Pub. L 93-406]

> Point Four—To the extent that the HRL's prohibition against sex discrimination is interpreted to compel an employer to modify a collective bargaining agreement, the HRL is preempted by the Federal labor policy. [National Labor Relations Act—U.S. Code, tit. 29, §151 et seq.]

We find no reasonable basis to conclude that these statutory provisions of the Federal Government were so excluded from the thinking of the Court of Appeals in its consideration of the Human Rights Law in the case of *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board (supra)* as to justify a reversal of the *Brooklyn* case by this court upon "new" grounds. All of the Federal statutes referred to by the petitioner as pre-emptive and exclusionary in regard to the Human Rights Law and/or the order of the administrative agency herein were in effect when the *Brooklyn* case was under consideration by the Court of Appeals both initially and upon the motion to reargue. In particular, the Court of Appeals' initial decision in the *Brooklyn* case (41 N Y 2d 84, *supra*) referred to the recent decision of the United States Supreme Court in the case of *General Elec. Co.* v. *Gilbert* (—— U.S. —— [97 S. Ct. 401]) which is relied upon by petitioner upon this appeal. Furthermore, the Court of Appeals has recently followed the *Brooklyn* case in *State Div. of Human Rights* v. *Jamestown Tel. Corp.* (42 N Y 2d 848).

The petitioner has not demonstrated any clear legal basis whereby the Federal statutes would preclude this State from finding that the instant facts were sex discrimination and requiring corrective action including prospec-

tive acts (see *Matter of Feinstein* [*Attorney General of State of N.Y.*], 36 N Y 2d 199, 200 referring to ERISA; cf. *Gaynor* v. *Rockefeller*, 21 A D 2d 92, 101-102, affd. 15 N Y 2d 120). In any event, we find the instant appeal is controlled by the decision in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board (supra)* and *State Div. of Human Rights* v. *Jamestown Tel. Corp. (supra)*.

There has been no cross-motion by the administrative agency for enforcement of the orders herein reviewed and, accordingly, no issues in that regard are before us.

Determinations confirmed, and petitions dismissed, with costs.

GREENBLOTT, J.P., SWEENEY, MAHONEY, LARKIN and HERLIHY, JJ., concur.

APPENDIX B

Decisions of the New York State Human Rights Appeal Board, Dated July 18, 1977

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case No. CS-28709-72

Appeal No. 2863

STATE DIVISION OF HUMAN RIGHTS
on the complaint of
JOSEPHINE KANDEFER and DELORES KOSTELNY,
Complainants-Respondent
vs.

WESTINGHOUSE ELECTRIC COMPANY, *et al.*,
Respondents-Appellant

Based on the decision of the New York Court of Appeals in Brooklyn Union Gas Company v. State Human Rights Appeal Board, 41 NY 2d 84, The Decision and Order of the State Division of Human Rights, dated June 9, 1975, is affirmed.

Dated and Mailed: July 18, 1977

By /s/ THOMAS A. CONNIFF
THOMAS A. CONNIFF

The following members concur in the foregoing decision and opinion:

HON. RICHARD WONG
HON. TIBBY BLUM
HON. IRMA VIDAL SANTABELLA

Appendix B

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case Nos. CS-28223-72, CS-28280-72, CSF-286929-72
CS-29299-73

Appeal No. 2249

STATE DIVISION OF HUMAN RIGHTS
on the complaint of
SHIRLEY J. FLEKER; PAMELA N. DOLAN;
MARJORIE ADAMS and BONNIE L. WEAD,
Complainants-Respondent

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent-Appellant

On the basis of the decision of the New York Court of Appeals in Brooklyn Union Gas Company v. State Human Rights Appeal Board, we affirm the Decision and Order of the Commissioner.

Dated & Mailed: July 18, 1977

By /s/ THOMAS A. CONNIFF
THOMAS A. CONNIFF

The following members concur in the foregoing decision and opinion:

HON. RICHARD WONG
HON. TIBBY BLUM
HON. IRMA VIDAL SANTAELLA

APPENDIX C

Decisions and Orders of the Commissioner of the New York State Division of Human Rights

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CSF-33259-74

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
DONNA J. STERLING,
Complainant,

against

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

PROCEEDINGS IN THE CASE

On the 17th day of April, 1974, the above-named Complainant filed a verified complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed

to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, in lieu of a hearing, the parties agreed upon a stipulation of facts, which was presented to Mathew Foner, Esq., a Hearing Examiner of the Division, on January 20, 1976.

Complainant was not represented by counsel. Respondent was represented by Jack B. Albanese, Esq. The Division was represented by Leonard Stecher, Esq., of Counsel.

Stipulated Facts

1. At all times herein pertinent, Respondent Westinghouse Electric Corporation is a corporation doing business in Horseheads, New York.

2. Complainant, Donna J. Sterling, is a woman.

3. In July, 1972, Respondent Company hired Complainant to work as a hourly employee.

4. On March 24, 1974, Complainant suffered a miscarriage that caused her to be confined overnight at the Arnot Ogden Hospital in Elmira, New York.

5. On March 25, 1974, Complainant informed Respondent Company that she was unable to come to work because of her miscarriage. She applied for sick pay.

6. Respondent Company carries insurance covering disabilities sustained by employees in consequence of ill-

ness or involuntary injury. The insurance coverage expressly excludes disabilities caused or aggravated by pregnancy, childbirth, miscarriage or abortion.

7. On March 25, 1974, Respondent informed the Complainant that its policy does not provide disability benefits for temporary disabilities caused by miscarriage or anything else dealing with maternity.

8. According to complainant's physician, Dr. Howland, Complainant was totally disabled due to the miscarriage from March 24, 1974 to April 6, 1974.

9. Complainant did not return to work April 6, 1974, because she suffered a fall on April 4, 1974, at her home and was further disabled for an additional two weeks.

10. Complainant again applied for disability benefits on April 10, 1974. She was placed on the disability roll by Respondent on April 12, 1974 and received disability benefits for this injury.

11. Respondent's disability plan includes an 8-day waiting period for employees who are not hospitalized.

12. As of March 24, 1974, Complainant had accrued one (1) day sickness and personal business.

13. As of March 24, 1974, Complainant's weekly benefit was $93.

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14. The activities of the Respondent in denying Complainant disability benefits humiliated the Complainant and caused her to suffer mental anguish.

15. Respondent Westinghouse's accident and sickness insurance provides weekly benefits for employees who become totally disabled as the result of non-occupational sickness or accident.

16. A covered employee is entitled to a weekly benefit in accordance with certain payment schedules geared to the employee's income; these benefits are available up to a maximum of 26 weeks.

17. The said benefits begin on the eighth day of disability, or if hospitalized earlier, on the first day of hospitalization.

18. The said plan, however, excludes pregnancy related disabilities; it provides, in pertinent part:

> "These benefits are not payable if the disability is due to pregnancy or resulting childbirth or to complications in connection therewith."

FINDINGS OF FACT

1. Complainant Donna J. Sterling was unable to continue in her employment with Respondent Westinghouse Electric Corporation between March 24 and April 6, 1974, inclusive, because of temporary physical disability due to pregnancy.

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2. Under the Human Rights Law, employers must treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, as temporary disabilities under any health or temporary disability insurance or sick leave plan available in connection with employment.

3. The exclusion of disability benefits for pregnancy-connected disabilities in the Workmen's Compensation Law, Section 200 et seq., relates to payment of benefits pursuant to that statute; it cannot be used by an employer to justify its failure to accord equal treatment to female employees in the terms, conditions and privileges of employment, as required by the Human Rights Law.

4. Respondent Westinghouse Electric Corporation unlawfully discriminated against Complainant, by failing to pay her disability benefits for the time period she was temporarily disabled from work by reason of her pregnancy to the same extent it provides such disability benefits to other employees for non-pregnancy connected disabilities.

5. Respondent's employee benefits program discriminates against its female employees in the terms, conditions and privileges of their employment by failing to provide benefits to employees who are unable to work because of pregnancy or pregnancy-related disability to the same extent it provides such benefits to employees who are unable to work because of non-pregnancy connected disabilities.

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DECISION

On the basis of the foregoing, I find that Respondent Westinghouse Electric Corporation discriminated against Complainant, because of her sex, in the terms, conditions and privileges of her employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that said Respondent discriminates against its female employees, because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that Respondent Westinghouse Electric Corporation, its agents, representatives, employees, servants, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that Respondent Westinghouse Electric Corporation, its agents, representatives, employees, servants, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

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1. Respondent shall within thirty (30) days from the date this Order becomes effective, pay to the Complainant accrued sick leave and disability benefits for the period commencing March 24, 1974 and ending April 6, 1974, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from April 1, 1974, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been granted sick leave and disability benefits commencing March 24, 1974.

2. Respondent shall furnish proof of payment within ten (10) days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

3. Respondent shall provide sick leave and disability benefits to female employees for pregnancy-connected disabilities and illnesses to the same extent it provides such benefits to employees for non-pregnancy connected physical disabilities and illnesses.

4. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions, instructing them that it has a policy of non-discrimination because of sex in providing disability benefits to female employees (in accordance with paragraph (3) hereinabove); and, that such supervisory employees, agents

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and/or representatives are required to implement said policy.

5. Respondent shall make available to the duly-authorized representative of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: Mar. 22, 1976
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Werner H. Kramarsky
Commissioner

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STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CS-34092-74

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
MARY J. SLEDGE,

Complainant,

against

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PROCEEDINGS IN THE CASE

On the 9th day of July, 1974, the above-named Complainant filed a verified complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, in lieu of a hearing, the parties agreed upon a stipulation of facts, which was presented to Mathew Foner, Esq., a Hearing Examiner of the Division, on January 20, 1976.

Complainant was not represented by counsel. Respondent was represented by Jack B. Albanese, Esq. The Division was represented by Leonard Stecher, Esq.

STIPULATED FACTS

1. At all times herein pertinent, Respondent Westinghouse Electric Corporation is a corporation doing business in Horseheads, New York.

2. Complainant, Mary J. Sledge, is a woman.

3. In October, 1973, Respondent Company hired Complainant.

4. In May of 1974, Complainant felt ill while working at her job, and reported to the company nurse Mrs. Forte.

5. Mrs. Forte instructed the Complainant to report to St. Joseph's Hospital, Elmira, for examination. The examination revealed that Complainant had developed an ectopic pregnancy.

6. On May 11, 1974 a St. Joseph's Hospital physician performed surgery on the Complainant removing her left tube.

7. Complainant remained a patient at St. Joseph's Hospital for approximately six (6) days and was subse-

quently confined to her bed at home for an additional six (6) weeks.

8. The Complainant applied for health and temporary disability insurance benefits from her employer.

9. Respondent Company informed the Complainant that the Company would not pay disability benefits to her because her disability was related to pregnancy.

10. Respondent Company carries insurance covering disabilities sustained by employees in consequence of illness or involuntary injury. The insurance coverage expressly excludes disabilities caused or aggravated by pregnancy, childbirth, miscarriage or abortion.

11. On July 8, 1974, the insurance carrier for the Company notified Complainant that her claim for disability benefits was rejected because "Disability due to pregnancy is excluded by the Disability Benefits Law."

12. After receiving her "Notice of Rejection of Claim for Disability Benefits" Complainant requested a review on July 19, 1974.

13. According to Complainant's physician, William H. Burke, M.D., Complainant was totally disabled from May 10, 1974 to July 30, 1974, due to ectopic pregnancy.

14. As of May 10, 1974, Complainant had accrued one (1) day sickness and personal business.

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15. As of May 10, 1974, Complainant earned $3.39½ per hour from Respondent.

16. Respondent Westinghouse's accident and sickness insurance plan provides weekly benefits for employees who become totally disabled as the result of non-occupational sickness or accident.

17. A covered employee is entitled to a weekly benefit in accordance with certain payment schedules geared to the employee's income; these benefits are available up to a maximum of 26 weeks.

18. The said benefits begin on the eighth day of disability or if hospitalized earlier, on the first day of hospitalization.

19. The said plan, however, excludes pregnancy related disabilities; it provides, in pertinent part:

> "These benefits are not payable if the disability is due to pregnancy or resulting childbirth or to complications in connection therewith."

FINDINGS OF FACT

1. Complainant Mary J. Sledge was unable to continue in her employment on May 10, 1974, because of temporary physical disability due to pregnancy.

2. Complainant was temporarily disabled due to pregnancy until July 30, 1974.

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3. Under the Human Rights Law, employers must treat disability caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, as temporary disabilities under any health or temporary disability insurance or sick leave plan available in connection with employment.

4. The exclusion of disability benefits for pregnancy-connected disabilities in the Workmen's Compensation Law, Section 200 et seq., relates to payment of benefits pursuant to that statute; it cannot be used by an employer to justify its failure to accord equal treatment to female employees in the terms, conditions and privileges of employment, as required by the Human Rights Law.

5. Respondent Westinghouse Electric Corporation unlawfully discriminated against Complainant because of her sex, in the terms, conditions and privileges of her employment, by failing to pay her disability benefits for the time period she was temporarily disabled from work by reason of her pregnancy to the same extent it provides such disability benefits to other employees for non-pregnancy connected disabilities.

6. Respondent's employee benefit program discriminates against its female employees in the terms, conditions and privileges of their employment by failing to provide benefits to employees who are unable to work because of pregnancy or pregnancy-related disability to the same extent it provides such benefits to employees who are unable to work because of non-pregnancy connected disabilities.

DECISION

On the basis of the foregoing, I find that Respondent Westinghouse Electric Corporation discriminated against Complainant because of her sex in the terms, conditions and privileges of her employment in violation of the Human Rights Law.

On the basis of the foregoing, I further find that said Respondent discriminates against its female employees, because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purpose of the Human Rights Law.

ORDER

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that Respondent Westinghouse Electric Corporation, its agents, representatives, employees, servants, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that Respondent Westinghouse Electric Corporation, its agents, representatives, employees, servants, successors and assigns shall take the following affirmative

action which will effectuate the purposes of the Human Rights Law:

1. Respondent shall within thirty (30) days from the date this order becomes effective, pay to the Complainant accrued sick leave and disability benefits for the period commencing May 10, 1974 and ending July 30, 1974, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from June 20, 1974, a reasonable intermediate date in accordance with Section 5001(b) of the C.P.L.R. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been granted disability benefits commencing May 10, 1974.

2. Respondent shall furnish proof of payment within ten (10) days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

3. Respondent shall provide sick leave and disability benefits to female employees for pregnancy-connected disabilities and illnesses to the same extent it provides such benefits to employees for non-pregnancy connected physical disabilities and illnesses.

4. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions, instructing them that it has a policy of non-discrimination because of sex in providing disability benefits

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for female employees (in accordance with paragraph (3) hereinabove); and that such supervisory employees, its agents and/or representatives are required to implement said policy.

5. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this order.

Dated: March 22, 1976
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Werner H. Kramarsky

Commissioner

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STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case Nos. CS-28223-72, CS-28280-72,
CSF 28629-72, CS-29299-73

STATE DIVISION OF HUMAN RIGHTS
on the complaints of
SHIRLEY J. FELKER, PAMELA N. DOLAN,
MARJORIE ADAMS and BONNIE L. WEAD,
Complainants,

against

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

PROCEEDINGS IN THE CASE

On the 2nd day of October, 1972, the 3rd day of October, 1972, the 3rd day of November, 1972 and the 2nd day of February, 1973, the above-named Complainants each filed a complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in an unlawful

discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the cases came on for hearing before George S. Sable, a Hearing Examiner of the Division. The hearing was held on October 9 and November 20, 1973.

The Complainants appeared at the hearing. Respondent was represented by Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., by Frederick T. Shea, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Elaine Berger, Esq., of Counsel.

FINDINGS OF FACT

1. Respondent Westinghouse Electric Corporation (hereinafter "Westinghouse") is a corporation doing business within the State of New York and operating a plant at Horseheads, New York.

2. Each of the Complainants herein was at the times mentioned in their respective complaints, employees of Respondent Westinghouse.

3. Complainant Marjorie Adams, a female, became pregnant in or about October, 1971, and when she was approaching her seventh month of pregnancy, she discussed her condition with Respondent's Industrial Nurse, Ms. Ina Dunlavey, who informed her that she must take maternity leave at the end of her seventh month of pregnancy and that she must sign a statement that the maternity leave request was voluntary. Complainant signed said statement requiring her to commence her leave on June 16, 1972, although she was ready, willing and able to work until de-

livery. She gave birth on July 29, 1972. Complainant had secured a note from Dr. Michael St. John stating that she could continue to work until delivery but a company nurse refused to accept it for the record. Complainant's childbirth involved a tubularligation and her doctor did not permit her to return to work until on or about October 30, 1972. Subsequently, Complainant voluntarily left Respondent's employment. Complainant could not draw Unemployment Insurance and received no company benefits during the period of her maternity leave.

4. Complainant Pamela N. Dolan, a female, notified Respondent's medical department in March, 1972 that she expected to give birth in November, 1972. Although she had her doctor's approval to work until delivery, Ms. Dunlavey informed her that, according to company policy, she could not work beyond her seventh month of pregnancy. Complainant was required to commence her maternity leave on September 18, 1972 and she gave birth on November 28, 1972. Complainant returned to work with her doctor's permission six weeks later. Complainant did not receive any sick pay or disability benefits during her maternity leave.

5. Complainant Shirley J. Felker, a female, became pregnant in or about May, 1971 and somewhere near the end of her seventh month of pregnancy she submitted a note from Dr. Burke to Respondent's medical department stating that she could work until January 1, 1972. However, Ms. Dunlavey informed Complainant that company policy required her to take maternity leave at the end of

her seventh month of pregnancy, and she was forced to commence her maternity leave on or about December 3, 1971. Complainant gave birth on February 4, 1972. Dr. Burke examined Complainant six weeks later and gave her permission to return to work. However, he recommended that she stay out six more weeks because she was emotionally upset and she returned to work on May 4, 1972. Complainant did not receive any company benefits during her maternity leave.

6. Complainant Bonnie L. Wead, a female, notified Respondent medical department in October, 1972 that she was in her fifth month of pregnancy. She produced a slip from her doctor indicating her due date was February 12, 1973, and requested and received permission to start maternity leave on December 12, 1972, although Ms. Dunlavey had told her she could work beyond the seventh month if she secured a note from her doctor saying it was all right. Complainant gave birth on February 13, 1973 and was told by her doctor that she could return to work the seventh or eighth week after her child was born. However, Complainant elected not to return to work. She received no company benefits during her absence.

7. At the time each Complainant except Wead went on maternity leave, Respondent Westinghouse had a policy (now discontinued) of requiring its female employees who were pregnant to cease work and go on unpaid maternity leave two months before the expected date of delivery.

8. During the periods covered by these complaints, Respondent Westinghouse maintained a Non-Occupational

Accident and Sickness Plan that conformed to the requirements of Article 9 of the New York State Workmen's Compensation Law. It covered the kinds of disabilities for which the New York State Law required an employer to provide disability insurance and it did not cover the kinds of disabilities that the New York State Law expressly excludes from compulsory coverage. There were no benefits payable where disability was due to pregnancy or in connection with childbirth.

9. Employees on maternity leave did not accrue seniority until Respondent agreed with the Union IBEW, Local No. 1833, AFL-CIO to change said policy as of June 24, 1973.

10. It is an unlawful discriminatory practice for an employer to establish an arbitrary point in pregnancy for commencement of maternity leave or to establish an arbitrary minimum period of time for duration of such leave. The employee must be permitted to continue working as long as she is physically able to perform the duties of her position and must be permitted to work as soon after confinement as she is physically able to resume performance of her duties.

11. Under the Human Rights Law, employers must treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, as temporary disabilities under any health or temporary disability insurance or sick leave plan available in connection with employment.

12. The exclusion of disability benefits for pregnancy-connected disabilities in the Workmen's Compensation Law, Section 200 et seq., relates to payment of benefits pursuant to that statute, and does not preclude the equal treatment of women in the terms, conditions and privileges of employment established under the Human Rights Law.

13. I find insufficient evidence to establish that Respondent discriminated against Complainant Bonnie L. Wead because of her sex.

14. Respondent unlawfully discriminated against Complainants Marjorie Adams, Pamela N. Dolan and Shirley J. Felker because of their sex in the terms, conditions and privileges of their employment, by failing to pay them for accrued sick leave and disability benefits for any portion of the time they were temporarily disabled from work by reason of their pregnancy to the same extent it provides such paid sick leave and disability benefits to other employees for non-pregnancy connected disabilities; and by failing to pay them the wages they would have received had they not been unlawfully required to take maternity leave.

15. Respondent's employee benefit program discriminates against its female employees in the terms, conditions and privileges of their employment by failing to provide benefits to employees who are unable to work because of pregnancy or pregnancy-related disability to the same extent it provides such benefits to employees unable to work because of non-pregnancy connected disabilities.

DECISION

Upon the basis of the foregoing, I find that Respondent Westinghouse discriminated against all Complainants except Bonnie L. Wead, because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

Upon the basis of the foregoing, I further find that Respondent Westinghouse discriminates against female employees because of their sex in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

Upon the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainants will effectuate the purposes of the Human Rights Law.

ORDER

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is

ORDERED, that the complaint of Bonnie L. Wead is hereby dismissed; and it is further

ORDERED, that Respondent Westinghouse, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person; and it is further

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ORDERED, that Respondent Westinghouse, its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent shall, within 30 days from the date this Order becomes effective, pay to each Complainant accrued sick pay and disability benefits for six weeks from the date each gave birth, except that Complainant Felker shall be paid for ten weeks, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities. Respondent shall restore to Complainant still in its employ all other rights, benefits and privileges to which they would have been entitled had they been granted paid sick leave and disability benefits in accordance with this Order. Respondent shall furnish proof of such payments within ten days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

2. Respondent shall furnish accrued sick leave benefits and disability benefits to female employees for pregnancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability.

3. Respondent shall pay to Complainants the wages they would have earned (less standard payroll deductions and other earnings, if any), from the date they were required to commence maternity leave to the date of delivery, except that Complainant Felker shall be paid only until January 1, 1972.

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4. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions, instructing them that it has a policy of non-discrimination because of sex in the treatment of employees; and that such supervisory employees, agents and/or representatives are required to implement said policy.

5. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: June 7, 1974
New York, New York

STATE DIVISION OF HUMAN RIGHTS

JACK M. SABLE
Commissioner

Appendix C

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case Nos. CS-27927-72, CS-28709-72

STATE DIVISION OF HUMAN RIGHTS
on the complaint of
JOSEPHINE KANDEFER and DELORES KOSTELNY,
Complainants,

against

WESTINGHOUSE ELECTRIC CORPORATION and its agent, J. J. JEFFREY, Pay Master, and LOCAL 1581, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFFILIATED WITH AFL-CIO,

Respondents.

PROCEEDINGS IN THE CASE

On the 31st day of August and on the 27th day of November, 1972, Complainants respectively, filed verified complaints, thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed

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to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for a consolidated hearing before Amos Carnegie, a Hearing Examiner of the Division. The hearing was held on November 1, 1973.

At the hearing, Complainants and Respondents appeared. The Complainants and Respondent Local 1581 were represented by Ruth Weyand, Esq. Respondents Westinghouse Electric Corporation and J. J. Jeffrey were represented by Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., by Frederick T. Shea, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Elaine Berger, Esq., of Counsel.

FINDINGS OF FACT

1. At all times herein pertinent, Respondent Westinghouse Electric Corporation (hereinafter "Westinghouse") is a corporation doing business in Cheektowaga, New York.

2. At all times herein pertinent, Respondent Local 1581, International Union of Electrical, Radio and Machine Workers (hereinafter "I.U.E.") is a union which represents certain classes of workers employed by Respondent Westinghouse including the units in which the Complainants herein worked.

3. Complainants Josephine Kandefer and Delores Kostelny were first employed by Respondent Westinghouse on June 1, 1962 and September 26, 1963, respectively.

4. Complainant Kandefer is employed as an Automation Coil Winder at an hourly pay rate of $3.71 in labor grade 4.

5. On or about July 14, 1972, Complainant Kandefer felt ill and called the plant to report her illness.

6. On July 16, 1972, Complainant Kandefer suffered a miscarriage and was hospitalized until July 20, 1972.

7. On or about July 27, 1972, Complainant's doctor advised her not to return to work for six to eight weeks; her doctor later gave his approval for her return to work on August 21, 1972, on which date she did return to work.

8. Complainant received disability papers from Respondent J. J. Jeffrey, the Corporation's "Employee Benefit Administrator." She had her doctor complete the papers and returned them to Respondent Jeffrey.

9. Thereafter, Complainant received a notice from Respondent Jeffrey stating that she would not be paid disability benefits.

10. Complainant talked the matter over with Mr. Ted Niedzicla, the insurance representative for Respondent I.U.E., who then assisted her in filing a complaint against Respondent Westinghouse with the New York State Division of Human Rights.

11. Complainant Kandefer's doctor and hospital bills arising out of her miscarriage were paid by her insurance

plan, and she lost no seniority or pension credit during her absence from work.

12. Complainant, Delores Kostelny, is employed as an Automation Coil Winder at an hourly pay rate of $4.05 in labor grade 5.

13. Complainant Kostelny became pregnant and was advised by her doctor to "take it easy." Pursuant to her doctor's advice Complainant took maternity leave on September 15, 1972.

14. Complainant's child was delivered by caesarean section on December 28, 1972.

15. Complainant remained in the hospital for five days. Complainant's doctor cleared her for all purposes six weeks following the birth of her child, to wit, on or about February 7, 1973.

16. Complainant, immediately after having been advised by her doctor to stop work, filed a claim with Respondent Westinghouse for weekly sickness and accident benefits which was rejected by Respondent Jeffrey. He informed Complainant that benefits were not payable if the disability was due to pregnancy.

17. Upon returning to work, Complainant Kostelny discovered that her effective seniority date had been changed from September 26, 1963 to March 15, 1964, because of Respondent Westinghouse's policy of prohibiting the accumulation of seniority and service credits while on a maternity leave of absence.

18. Respondent Westinghouse's accident and sickness insurance plan provides weekly benefits for employees who become totally disabled as the result of non-occupational sickness or accident.

19. A covered employee is entitlted to a weekly benefit in accordance with certain payment schedules geared to the employee's income; these benefits are available up to a maximum of 26 weeks.

20. The said benefits begin on the eighth day of disability or if hospitalized earlier, on the first day of hospitalization.

21. The said plan, however, excludes pregnancy related disabilities; it provides, in pertinent part:

"These benefits are not payable if the disability is due to pregnancy or resulting childbirth or to complications in connection therewith."

22. Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities, and must be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

23. I find that Complainant Josephine Kandefer was disabled from July 14, 1972 to August 21, 1972 as the result of a miscarriage and the failure of Respondent Westinghouse to provide her with the same benefits received by

other employees who are temporarily disabled unlawfully discriminated against her because of her sex.

24. I find that Complainant Delores Kostelny was disabled from September 15, 1972 to February 7, 1973 by reason of her pregnancy and that the failure of Respondent Westinghouse to provide her with the same benefits received by other employees who are temporarily disabled unlawfully discriminated against her because of her sex.

25. I find that Respondent Westinghouse's policy of prohibiting the accumulation of seniority and service credits for an employee who is away from work because of a disability due to pregnancy discriminates against such employee because of sex, in violation of the Human Rights Law, where the said prohibition does not extend to other absences caused by other kinds of temporary physical disabilities.

26. I find that Complainant Delores Kostelny is entitled to have her effective seniority date returned to September 26, 1963.

27. Respondent Westinghouse's insurance plan discriminates against its female employees in the terms, conditions and privileges of their employment by failing to provide benefits to employees who are unable to work because of pregnancy or pregnancy-related disabilities to the same extent it provides such benefits to employees unable to work because of non-pregnancy connected disabilities.

28. I find that Respondent J. J. Jeffrey, as "Employee Benefit Administrator", is responsible for carrying out the policies established by Respondent Westinghouse, and did not otherwise, have any role in the adoption, promulgation or establishment of its policies.

29. I find that there is insufficient evidence in the record to show that Respondent Local 1581 discriminated against the Complainants.

Decision

On the basis of the foregoing, I find that Respondent Westinghouse Electric Corporation discriminated against the Complainants because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondent Westinghouse Electric Corporation, discriminates against its female employees because of their sex in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondent J. J. Jeffrey did not discriminate against the Complainants.

On the basis of the foregoing, I further find that Respondent Local 1581, International Union of Electrical, Radio and Machine Workers, did not discriminate against the Complainants.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainants, Josephine Kandefer and Delores Kostelny will effectuate the purposes of the Human Rights Law.

Order

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

Ordered, that the Respondent Westinghouse Electric Corporation, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person and it is further

Ordered, that the complaint against Respondent J. J. Jeffrey be and the same hereby is dismissed, and it is further

Ordered, that the complaint against Respondent Local 1581, International Union of Electrical, Radio and Machine Workers be and the same hereby is dismissed, and it is further

Ordered, that the Respondent Westinghouse Electric Corporation, its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent shall within thirty (30) days from the date this Order becomes effective, pay to the Complainant Josephine Kandefer disability benefits for the period commencing July 14, 1972 through August 20, 1972, to the same extent such payments are made to its other employees for

non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from August 2, 1972, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled to had she been granted disability benefits for the period commencing July 14, 1972 through August 20, 1972.

2. Respondent shall within thirty (30) days from the date this Order becomes effective, pay to the Complainant Delores Kostelny disability benefits for the period commencing September 15, 1972 through February 7, 1973, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities, plus interest at a rate of six percent per annum from November 27, 1972, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges, including lost service credit, to which she would have been entitled to had she been granted disability benefits for the period commencing September 1, 1972 through February 7, 1973.

3. Respondent shall furnish proof of the payments required herein within ten (10) days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

4. Respondent shall reinstate Complainant Delores Kostelny's effective seniority date to September 26, 1963.

5. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions, instructing them that it has a policy of non-discrimination because of sex in the treatment of employees, and that such supervisory employees, agents and/or representatives are required to implement said policy.

6. Respondent shall provide disability benefits to female employees for pregnancy-related disabilities to the same extent it provides such benefits to employees for other forms of temporary physical disabilities.

7. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this order.

Dated: Jun. 9, 1975
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Werner H. Kramarsky
Commissioner

APPENDIX D

Order of the Appellate Division of the Supreme Court of New York, Third Department, Dated February 22, 1978

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of December, 1977

Present:

Hon. Louis M. Greenblott, Justice Presiding,
Hon. Michael E. Sweeney
Hon. A. Franklin Mahoney
Hon. John L. Larkin
Hon. J. Clarence Herlihy Associate Justices.

Index No. 31313

In the Matter of

Westinghouse Electric Corporation,
Petitioner,

against

State Human Rights Appeal Board, *et al.*,
Respondents.

Index No. 31313A

In the Matter of

Westinghouse Electric Corporation,
Petitioner,

against

State Human Rights Appeal Board, *et al.*,
Respondents.

Appendix D

Westinghouse Electric Corporation having applied to this Court pursuant to Section 298 of the Human Rights Law (Executive Law Art. 15) for an order setting aside certain orders of the State Human Rights Appeal Board dated May 12, 1977 and July 18, 1977, and the said proceedings having been presented during the above-stated term of this Court and having been submitted by Kelley Drye & Warren, attorneys for petitioner, Frederick T. Shea, Esq., of counsel, and by Ann Thacher Anderson, Esq., of counsel to respondent State Division of Human Rights, and, after due deliberation, the Court having rendered a decision on the 19th day of January, 1978, it is hereby

Ordered that the orders of the State Human Rights Appeal Board be and the same hereby are confirmed, and the petitions dismissed, with costs.

Enter:

John J. O'Brien
Clerk

Dated and Entered: February 22, 1978.
A True Copy

/s/ John J. O'Brien
Clerk

APPENDIX E

Decision Slip of the New York State Court of Appeals Denying Leave to Appeal, Dated July 11, 1978

3 Mo. No. 491

St. Vincent's Medical Center of Richmond,
Appellant,

vs.

State Human Rights Appeal Board, State Division of Human Rights, Barbara Ann Mackey, and Patricia P. Hagberg,
Respondents.

Westinghouse Electric Corporation,
Appellant,

vs.

State Human Rights Appeal Board and State Division of Human Rights on the Complaints of Donna J. Sterling & ors.,
Respondents.

Motion for leave to appeal &c. denied with twenty dollars costs and necessary reproduction disbursements. Fuchsberg, J., taking no part.

DECISION COURT OF APPEALS

JUL 11 1978

APPENDIX F

Sections 4 and 514 of the Employee Retirement Income Security Act, 29 U.S.C. §§1003 and 1144

Section 4 of the Employee Retirement Income Security Act, 29 U.S.C. §1003, contains the following provisions:

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 2003(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

Section 514 of the Employees Retirement Income Security Act of 1974, 29 U.S.C. 1144, contains the following provisions:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an

insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX G

Analysis of State Fair Employment Practice Laws

[All citations are to the Fair Employment Practices Manual published by the Bureau of National Affairs, Volume 8A]

1. States Proscribing Discrimination on the Basis of Handicap

Alaska—Page 453:205 et seq., §18.80.220
California—Page 453:805 et seq., §1420
Colorado—Page 453:1005 et seq., §24-34-306
Connecticut—Page 453:1205 et seq., §31.126
Florida—Page 453:1805 et seq., §13.261
Hawaii—Page 453:2205 et seq., §378-2
Illinois—Page 453:2605 et seq., §3
Indiana—Page 453:2805 et seq., §22-9-1-2
Iowa—Page 453:3005 et seq., §601A.6
Kansas—Page 453:3201 et seq., §44-1009
Kentucky—Page 455:51 et seq., §207.130 et seq.
Maine—Page 455:405 et seq., §4572
Maryland—Page 455:605 et seq., §16
Massachusetts—Page 455:805 et seq., §4
Michigan—Page 455:1005 et seq., Article 2, §202
Minnesota—Page 455:1205 et seq., §363.03
Montana—Page 455:1805 et seq., §64-304
Nebraska—Page 455:2005 et seq., §48-1104
Nevada—Page 455:2205 et seq., §613.330
New Hampshire—Page 455:2405 et seq., §354-A:2
New Jersey—Page 455:2605 et seq., §10:5-4.1
New Mexico—Page 455:2805 et seq., §4-33-7
New York—Page 455:3005 et seq., §296

North Carolina—Page 455:3205 et seq., §143-416.2
Ohio—Page 457:205 et seq., §4112.02
Oregon—Page 457:605 et seq., §659.400
Pennsylvania—Page 457:805 et seq., §955
Rhode Island—Page 457:1205 et seq., §28-5-7
Tennessee—Page 457:1855 et seq., §1
Texas—Page 457:2015 et seq., §1 et seq.
Vermont—Page 457:2405 et seq., §498
Virginia—Page 457:2651, §40.1-28.7
Washington—Page 457:2805 et seq., §49.60.180
West Virginia—Page 457:3005 et seq., §5-11.9
Wisconsin—Page 457:3205, §111.32

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISON OF HUMAN RIGHTS on the Complaints of DONNA J. STERLING, MARY J. SLEDGE, SHIRLEY J. FELKER, PAMELA N. DOLAN, MARJORIE ADAMS, BONNIE L. WEAD, JOSEPHINE KANDEFER and DOLORES KOSTELNY,

Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

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Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Question Presented

In view of (1) the inapplicability of the Employee Retirement Income Security Act of 1974 (ERISA) to causes of action which arose before January 1, 1975; (2) the exclusion from the supersedure clause in ERISA of em-

ployee benefit plans maintained solely to comply with State disability benefit laws; and (3) the provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to employees than what was afforded by Title VII before its amendment on October 31, 1978, does the Supremacy Clause invalidate a decision of the Appellate Division* requiring petitioner to provide to employees disabled in any way connected with pregnancy fringe benefits equivalent to those provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities?

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Article 15 (McKinney's 1972), hereinafter "the Human Rights Law," to an employer which in 1972, 1973 and 1974 disallowed to employees disabled in connection with pregnancy and childbirth fringe benefits provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities.

In 1974, 1975 and 1976, after hearings under the Human Rights Law, the State Division of Human Rights issued orders finding petitioner's practice discriminatory as to sex, and directing petitioner to cease and desist and to provide, for employees disabled in any way connected with pregnancy, fringe benefits equivalent to those pro-

* *Westinghouse Electric Corp.* v. *State Human Rights Appeal Board,* 60 App. Div. 2d 943, 401 N.Y.S.2d 597 (3rd Dept. 1978), *appeal dismissed,* 44 N.Y.2d 731, —— N.E.2d ——, *appeal denied,* 45 N.Y.2d 705, —— N.E.2d ——.

vided for employees disabled by nonoccupational injury or illness. The Division's orders were sustained on the rule in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board,* 41 N.Y.2d 84, 359 N.E.2d 393 (1976).

Petitioner perceives a conflict with the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§1001 *et seq.*, although each complainant's cause of action arose before the effective date of the Act, and although ERISA does not purport to supersede State legislation relating to plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. §1003(b)(3); see §1144(a). And although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, 42 U.S.C. §§2000e-7, 2000h-4, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and decisions thereunder. Petitioner claims these conflicts sufficient to raise a question under the Supremacy Clause, U.S. Const. Art. VI cl. 2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under ERISA.

Petitioner relies on the supersedure clause in ERISA, 29 U.S.C. §1144(a), and on its legislative history, to substantiate its argument that the courts of New York erred in sustaining the Division's orders. This Court has recognized ERISA as a comprehensive Federal regulation preempting State laws but as expressly disclaiming any effect with regard to events antedating January 1, 1975. *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L.Ed.2d 443, 447 n.1 (1978); see 29 U.S.C. §1144(b), providing that ERISA does not apply to causes of action which arose before that date.

The causes of action in this case arose in 1972, 1973 and 1974, when the complainants were disallowed, for periods of disability connected with pregnancy, benefits provided by petitioner uniformly, pursuant to the State Disability Benefits Law, N.Y. Workmen's Compensation Law Art. 9 (McKinney's 1965) ("DBL"), to employees disabled otherwise. ERISA does not apply.

But even if ERISA did apply, it would not preempt application of the Human Rights Law in this case. Excluded from the operation of the supersedure clause in ERISA, 29 U.S.C. §1144(a), are employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." §1003(a)(3). The supersedure clause of ERISA permits application of State fair

employment legislation to plans like petitioner's which fall within that exclusion. On August 3, 1977, the Disability Benefits Law was amended to impose upon employers in the State of New York, including petitioner, a requirement substantially similar to the requirements of the Division's orders. L. 1977 ch. 675 (hereinafter "the DBL Amendments"). The effect of the DBL Amendments is to legislate a mandatory minimum wage replacement benefit for employees disabled by pregnancy. The minimum benefit is half-pay up to $95 per week. DBL §204.2 as amended, L. 1974 ch. 583 §6. Benefits under a plan or agreement must be "at least as favorable" as the statutory benefits. DBL §211.5. A plan can be restricted to one or more classes of employees, but a class cannot be determined arbitrarily. 12 N.Y.C.R.R. §§355.6, 355.7. The DBL Amendments thus require the same evenhanded provision of benefits directed by the Division's orders. The Division respectfully submits that the question petitioner seeks to raise under ERISA with respect to those orders is so easily answered by the provisions of ERISA, the DBL and the DBL Amendments that nothing is left warranting review by this Court. Substantially, if not entirely, the question is moot.

Even if this Court should perceive some marginal viability in the question, ERISA would not necessarily preempt application of the Human Rights Law to petitioner's employee benefit plan. ERISA contains a nonimpairment clause indicating Congressional intent to permit application of State fair employment legislation to employee benefit plans:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sec-

tions 1031 and 1137(b) of this title) or any rule or regulation issued under any such law." 29 U.S.C. §1144(d).

Title VII is not mentioned in Sections 1031 and 1137(b), and therefore continues in full force and effect.

No distinction is made in ERISA between the substantive provisions of Title VII, 42 U.S.C. §§2000e-2, 2000e-3, and the numerous provisions recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(g)(1), 2000e-5(b)-(e), 2000e-7, 2000e-8(b); see §2000h-4. The nonimpairment clause of ERISA preserves Title VII in its entirety, including provisions permitting application of more stringent State statutes.

During debate on ERISA, an amendment was offered to add a clause prohibiting discrimination. The amendment was dropped after reference was made to the applicability of the prohibitions in Title VII. 119 Cong. Rec. 30409-10 (Sept. 19, 1973); 120 Cong. Rec. 4726 (Feb. 28, 1974).

Rejection by Congress of a nondiscrimination clause in ERISA and Congressional reliance, in the drafting and enactment of ERISA, upon Title VII and its provisions acknowledging and preserving State fair employment legislation appear to place a heavy burden upon those who would argue that States should play no part in eliminating discrimination in employee benefit plans. See Feerick, "Labor Relations—Birth of a Child," N.Y.L.J. June 3, 1977 p. 1 col. 1 at 26 col. 3. The Division respectfully submits that this is not a case in which that burden can be discharged. References to ERISA in debate on other legislation, see Petition at 12-14, do not change the provisions of ERISA which recognize and preserve Title VII and its relationship to State and local counterparts.

The recent amendment of Title VII to protect the pregnant worker, P.L. 95-555 (hereinafter "the Title VII Amendment") extinguishes the question petitioner has sought to raise. The amendment demonstrates intent on the part of Congress not only to prohibit discrimination against the pregnant worker in terms, conditions and provisions of employment, but also—in the face of ERISA—to continue deferring to State and local fair employment agencies, including the Division, for the initial enforcement of that prohibition through counterparts in State and local law. See Point II, *infra*. As to matters antedating the effective date of the Title VII Amendment, the petition retains little if any viability. A pronouncement as to petitioner's rights and responsibilities before that date under the Human Rights Law and ERISA would be largely academic, engaging this Court in a retrospective exercise made futile by supervening legislation.

II. Petitioner raises no substantial question under Title VII.

Petitioner cites *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), to justify its withholding from employees disabled in connection with pregnancy fringe benefits provided by petitioner to employees disabled otherwise. Those cases are not in point.

Aiello upholds under the Equal Protection Clause of the Fourteenth Amendment a California statute excluding disabilities connected with normal pregnancy from coverage of an employee-funded program of disability benefits. In a footnote which is frequently cited and quoted, this Court took care to point out that State legislatures are constitutionally free to include or exclude pregnancy from the coverage of such legislation on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496 n.20. Under *Aiello,* therefore, State fair employment legislation may constitutionally be applied to protect pregnant workers from disallowance of employee benefits paid to colleagues who are not pregnant.

Gilbert holds that an employer does not discriminate as to sex in violation of Title VII by excluding pregnancy-related disabilities from fringe benefits provided for other disabilities. Even if this Court were to equate the issue here with the issue in *Gilbert,* it could not hold that Title VII controls and restricts interpretation of the Human Rights Law. Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the State statute permits what Title VII prohibits there is conflict and Title VII will preempt and supersede. 42 U.S.C. §2000h-4. But when the State statute prohibits what Title VII permits there is no preemption. 42 U.S.C. §2000e-7. States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts," Frankfurter, J., concurring, in *Railway Mail Ass'n* v. *Corsi,* 326 U.S. 88, 98 (1945).

Like the question under ERISA, the question petitioner seeks to raise under Title VII is extinguished by the Title VII Amendment, which now affords the pregnant worker much of the protection available under the Human Rights Law.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
December 6, 1978

Respectfully submitted,

Ann Thacher Anderson
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD, et al.,
Respondents.

BRIEF AMICI CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AND I.U.E. LOCAL 1581 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WINN NEWMAN
General Counsel
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO-CLC
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006

December, 1978 *Attorneys for Amici Curiae*

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The International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "I.U.E.") and I.U.E. Local 1581 file this Brief Amici Curiae in opposition to the Petition for Writ of Certiorari filed by Westinghouse Electric Corporation in this case. The Brief is filed, pursuant to Rule 42(1) of the Rules of this Court, with the consent of the parties.

INTEREST OF AMICI

I.U.E. and its affiliated locals represent more than 22,000 hourly and salaried workers at forty-one plants operated by petitioner Westinghouse Electric Corporation, including three plants in New York State. I.U.E. Local 1581 is the collective bargaining agent at Westinghouse's Buffalo, New York facility, one of the plants involved in this case.

I.U.E. has, pursuant to its statutory duty of fair representation, long opposed unlawful discrimination in the work place. Through collective bargaining, grievances, arbitration and litigation, I.U.E. has systematically challenged practices that disadvantage women workers, including the denial of disability benefits to pregnant workers. I.U.E. appeared as *amicus curiae* in this Court in *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974), and *Geduldig v. Aiello,* 417 U.S. 484 (1974), cases challenging the discriminatory treatment of pregnant workers under the Fourteenth Amendment. I.U.E. was a plaintiff in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), a case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to eliminate pregnancy based discrimination. It has filed a similar suit against Westinghouse, which was recently remanded to the district court by the Third Circuit to consider pregnancy related issues under Title VII. See *Eberts v. Westinghouse Electric Corp.,* 581 F.2d 357 (3d Cir. 1978).

At the state level, I.U.E. locals have filed numerous charges of pregnancy based discrimination under state fair employment practice laws. In fact, one of the complaints in this case was filed with the assistance of I.U.E. Local 1581 and was prosecuted before the Division of Human Rights by attorneys employed by the I.U.E. Petition for Writ of Certiorari (hereinafter "Petition") at A33-34. I.U.E. has similar cases pending under state laws in Wisconsin, Pennsylvania and New York. Finally, the I.U.E. and several of its locals appeared as *amici curiae* in *Quaker Oats Co. v. Cedar Rapids Human Rights Commission,* 268 N.W. 2d 862 (Iowa 1978), to urge the Iowa Supreme Court to bar

pregnancy based discrimination under that state's human rights law.

Despite the recent amendment to the Civil Rights Act prohibiting pregnancy based discrimination, Pub. L. 95-555, state fair employment agencies remain an essential part of the national enforcement machinery to eliminate sex based discrimination. Adoption of either of the preemption arguments urged by Westinghouse in its Petition would therefore seriously undermine the anti-discrimination efforts of the I.U.E. and its affiliated locals.

ARGUMENT

The Petition for Writ of Certiorari should not be granted because the ERISA preemption issue raised by the petition is not squarely or clearly presented by the record and because resolution of this issue is unnecessary at the present time.

I.

The Issues Raised in the Petition Are Not Squarely or Clearly Presented in This Case.

The principal question presented in the Petition is whether section 514(a) of the Employee Retirement Income Security Act (ERISA) preempts state fair employment laws that prohibit discrimination in health and welfare plans against pregnant employees. For several reasons, that issue is not squarely or clearly presented in this case.

1. The acts of discrimination against the eight individual complainants in this case occurred during 1971, 1972, 1973 and 1974. Petition for Writ of Certiorari at

A8, A17, A24-A26, A34-A35. Section 514(a) of ERISA, on which petitioner's preemption argument relies, did not take effect until January 1, 1975. 29 U.S.C. § 1144 (a). The Act provides that the preemption provision "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Thus, it is not even arguable that ERISA preempts the orders of the New York State Division of Human Rights granting relief to the eight individual complainants in this case.

2. Although the Division's orders granted prospective relief as to other employees at petitioner's plants, Petition at A13, A21, A30, A41, the effect of these orders was vitiated by a subsequent decision of the New York Court of Appeals. In *Board of Education of Union Free School District No. 2, East Williston, Town of North Hempstead v. New York State Division of Human Rights,* 44 N.Y. 2d 902, 407 N.Y. S.2d 636 (1978), the Court of Appeals ruled that the Division of Human Rights may not enforce a prior affirmative order on behalf of individuals not named as complainants in the original proceeding. Instead, such persons must initiate their own proceedings by filing charges of discrimination with the Division within the statutory limitations period. As a result of *East Williston,* the prospective orders of the Board challenged here are of no effect.

3. Apart from the invalidity of the prospective orders in this case, the ERISA preemption question presented in the Petition is no longer of any significance in New York because of a subsequent change in New York insurance laws. At the time that these cases were decided by the Division, the New

York Worker's Compensation Law (Disability Benefits Law) specifically excluded pregnancy from the law's mandatory coverage. See *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board,* 41 N.Y. 2d 84 (1976). However, effective August 3, 1977, the Worker's Compensation Law was amended to require employers to provide at least eight weeks of coverage for disabilities resulting from normal pregnancies and additional coverage where there have been complications. L. 1977, c. 675 § 29, amending Worker's Compensation Law § 205(3).

Thus, quite apart from the orders of the Division under the New York Human Rights Law, Westinghouse has been required since August 3, 1977 to provide at least eight weeks of disability benefits for its pregnant employees in New York.[1] Since state insurance laws, such as the Worker's Compensation Law, are expressly excepted from the ERISA preemption provision, 29 U.S.C. § 1144(b)(2)(A), resolution of the issue presented in the Petition would have no effect on the prospective obligations of Westinghouse and other employers in New York State.

In sum, the orders challenged here clearly are not preempted by ERISA with respect to the individual complainants. With respect to the prospective relief

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[1] The New York Court of Appeals held in *Brooklyn Union Gas* that the Human Rights Law takes precedence over any limitation in the Worker's Compensation Law. 41 N.Y. 2d at 88. Thus, an employer might still be obligated by the Human Relations Law to pay more than the minimum mandated by the Disability Benefits Law. It is extremely doubtful whether many such cases will arise, however, since the normal period of disability for pregnancy does not exceed eight weeks, and extra benefits for cases involving complications are mandated by the DBL.

ordered by the Division, the preemption question has been mooted both by a subsequent decision of the New York Court of Appeals and by the 1977 amendment to the New York Disability Benefits Law. Because of these factors, certiorari is not appropriate in this case.

II

Apart from Factors Peculiar To This Case, the Question Whether ERISA Preempts State Anti-discrimination Laws Should Not Now Be Reviewed.

Apart from the foregoing factors peculiar to this case, there are a number of reasons why the question whether ERISA preempts state anti-discrimination laws should not be decided at this time.

1. There is no significant conflict among the lower courts with respect to the ERISA preemption question. Each of the other state intermediate appellate courts that has decided the question has agreed with the court below in this case. *Goodyear Tire & Rubber Co. v. Department of Industry, Labor and Human Relations,*—N.W.2d—(Wis. Ct. of App. Nov. 22, 1978); *Gast v. State of Oregon,* 585 P.2d 12 (Or. Ct. of App. 1978); *Liberty Mutual Insurance Co. v. State Division of Human Rights,* 402 N.Y.S. 2d 218 (2d Dept. 1978). The issue has not yet even been decided by the highest court of any state, nor by any United States Court of Appeals.[2]

[2] Most of the ERISA cases cited by Westinghouse differ significantly from this case. Under section 514(d) of ERISA, nothing in ERISA modifies or supersedes any provision of any other federal law. 29 U.S.C. § 1144(d). Title VII of the Civil Rights Act of 1964, which is a federal law within the meaning of section 514(d),

2. Contrary to petitioner's suggestion, Petition at 17 n. 11, there is no likelihood of "massive backpay awards" under state law. Remedies under state FEP laws are generally limited to individual complainants, who must meet rigid statutory requirements for filing discrimination complaints. 5 Newberg, Class Actions 1267 (1st ed. 1977). Furthermore, a number of states, like New York, require coverage of pregnancy under their disability insurance laws, see Cal. Unemp. Ins. Code § 2626.2 (West Supp. I 1978); Haw. Rev. Stat. §§ 392-3, 392-21; N.J. Stat. Ann. § 43-21-29; R.I. Gen. Laws, § 28-41-8, which are not preempted by ERISA. 29 U.S.C. § 1144(b)(2)(A).

3. As noted earlier, on October 31, 1978, Congress amended Title VII of the Civil Rights Act to prohibit all forms of pregnancy based discrimination. Under this statute, employers such as Westinghouse have 180 days to provide full and equal benefits for pregnancy related disabilities. Thus, after this date, there will be no possibility of conflict between federal law and state antidiscrimination laws that prohibit pregnancy discrimination. Yet, the ERISA preemption argument urged by Petitioner would bar the use of state enforcement machinery after the effective date of Pub. L.

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in turn preserves state fair employment laws such as the New York Human Rights Law. 42 U.S.C. § 2000e-7. A major question presented by this case, therefore, is whether § 514(d) preserves all of Title VII, including its retention of state law, and if so, whether section 514(a), the ERISA preemption provision, overrides section 514(d). In contrast, most of the ERISA preemption cases cited by petitioner do not involve any question under section 514(d).

95-555, in contradiction to the policy expressed in Section 708 of Title VII, 42 U.S.C. § 2000-e7.[3]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

WINN NEWMAN
General Counsel
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO-CLC
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae

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[3] Petitioner offers no specific reasons why this Court should decide the second question presented in its Petition, whether Title VII preempts state FEP laws that prohibit sex discrimination in employee benefit plans. Of course, Title VII expressly preserves state laws. 42 U.S.C. § 2000e-7; and see 42 U.S.C. § 2000h-4. As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), "Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."